IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 513 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

S P ASSTT DIRECTOR OF INSP. INCOME TAX

Versus

SHOBHANABEN RASIKLAL PATEL

Appearance:

1. Criminal Appeal No. 513 of 1989

MR RP BHATT for Petitioner No. 1

MR MANISH R BHATT for Petitioner No. 1

MR AD SHAH for Respondent No. 1

MR KP RAWAL APP for Respondent No. 2

CORAM : MR.JUSTICE D.K.TRIVEDI

Date of decision: 20/09/2001

ORAL JUDGEMENT

1. The appellant - original complainant has challenged the order of acquittal recorded by the learned Additional Chief Metropolitan Magistrate dated 26th May, 1989 passed in Criminal Case No. 343/87, wherein, after considering the evidence led by the prosecution and considering the defence, the learned Magistrate has recorded the order of acquittal, acquitting the accused from the offence punishable under Section 181 of the Indian Penal Code.

2. This appeal is fixed for final hearing after 11 years. When the matter was before me last on 11th September, 2001, none appear for the appellant and considering the request made on behalf of Mr. A.D.Shah, learned advocate appearing for the respondent No. 1, the matter was kept for hearing today.

3. During the hearing, with the help of Mr. Rawal, Ld. APP, appearing for the State, I was taken through the oral as well as documentary evidence and judgement under challenge. On going through the record, it is found that the appellant S.P. Singh, Assistant Director of Inspection (Investigation) has filed the complaint against the accused in the court of learned Chief Metropolitan Magistrate for the offences under Sections 181 and 193 of the I.P.C. It is not in dispute that the appellant - original complainant is the Assistant Director of Inspection (Investigation)-IV, Ahmedabad under the Income Tax Act, 1961 and as such a public servant within the meaning of Section 21 of the Indian Penal Code and the proceedings before him are judicial proceedings. It is the case of the complainant that the complainant had after obtaining search warrant to search the premises of Shri Rasikbhai Haribhai Patel, the husband of the respondent accused situated at 3, Jagjivan Park, Nr. Ishwar Bhuvan, Navrangpura, Ahmedabad on 29th May, 1985 as per the provisions of Section 132 of the Income Tax Act (hereinafter referred as "Act"), had searched the premises and before the commencement of the search of the house, he has recorded the statement of the accused on oath. It is the case of the complainant that while recording such statement of the respondent and while giving answers to the questions put to her regarding question Nos. 13 and 17, the respondent accused has on oath stated that she has no locker in her name or in the joint name in the Bank in Ahmedabad or out side Ahmedabad nor she has having any locker with private company and further, that she has no knowledge that any locker was in the name of Rasikbhai, her husband, or any locker in the name of father and mother of her husband Rasiklal and she further replied that she has never

operated any Bank locker. It is the case of the complainant that the accused had Bank locker with United Commercial Bank, St.Xavier's School Road Branch, Ahmedabad, jointly with her husband - Shri Rasikbhai Patel and she did operate the said locker. It is the case of the complainant that the accused has income from partnership business share in M/s. Pramukh Trading Co. According to the complainant, the respondent knowingly made false statement on oath to the complainant and also gave false evidence and thereby committed offences punishable under Sections 181 and 193 of the I.P.C. In support of the complaint, the complainant had cited the statements of witness Shri P.G. Karode, the Income Tax Officer, Circle -I, Ward - C, Ahmedabad and another witness Branch Manager, United Commercial Bank, St. Xavier's School Road Branch, Ahmedabad. The said complaint was dated 13th March 1986 and it was numbered as Criminal Case No. 285 of 1985 (1986). It is further found from the record that the accused has filed application for seeking discharge, which was allowed by the learned Magistrate and being aggrieved by the said order of discharge, the complainant has preferred Revision Application before the Sessions Court and the Sessions Court had set aside the order of granting discharge and remanded the matter back for trial before the Court of learned Magistrate.

4. The complainant P.W. - 1, Surendra Prakash Singh has deposed that he was working as Assistant Director of Inspection since 14th September, 1983 and a search warrant was issued to search the premises of the husband of the accused and it was signed by Dy. Director Shri Sinde, according to the search warrant, he has visited the residential premises of the husband of the accused on 29th April, 1985 and at that time, the accused Shobhanaben was present and he has obtained her signature on the warrant. After two hours, Rasikbhai, husband of the accused came and he has also obtained the signature of Shri Rasikbhai and he has also done the panchnama about the search of the residential premises of Rasikbhai in presence of panchas and the panchas have also signed the said panchnama as well as Rasikbhai has also signed the said panchanama. The said panchanama is on record at Ex. 4. The complainant S.P. Singh has deposed while giving his chief examination that before searching the premises, he has recorded the statement of the respondent accused after administering oath and the respondent had in his presence put the signature. The statement of the respondent accused was recorded, which is produced on record at Ex. 5 and the complainant has put his signature on each page. The statement recorded by the

complainant shows that before recording the statement of the respondent accused, the complainant has administered oath and in reply to the questions put by the complainant, the respondent had replied the questions. However, it is the case of the complainant that in respect of the question put to her at question No. 13 in respect of the locker, that whether you or your family members had any locker in your name or in the joint name in Ahmedabad or elsewhere, the accused has replied that she has no locker in her name as well as in joint name in Ahmedabad nor outside the Ahmedabad and she has also not possessed any locker with the private company and further she has no knowledge that her husband Rasikbhai had any locker in his name or in the name of his father and mother, question No. 17, wherein, the complainant has put question to her that whether there is any joint locker at Jabalpur or in Ahmedabad in the name of Rasikbhai and in reply to the said question, the respondent had said "No" and said that she has no knowledge and further she has never operated the Bank locker. It is the case of the complainant that the statements given by the respondent accused in respect of the question Nos. 13 and 17 were false and accordingly, the accused has committed the offence punishable under Section 181 and 193 of the I.P.C. The complainant has further deposed in his chief that during his inquiry, he came to know that the accused was having locker No. 210 in the joint name of herself and her husband with United Commercial Bank, St. Xavier's School Road Branch, Ahmedabad. In the cross examination, the complainant has admitted that he came to know that the accused has locker on the very day, when he has recorded the statement of the respondent and the complaint was thereafter filed after 10 months as per the procedure. He has further deposed that in the warrant, neither the name of her nor her husband was found. In the cross - examination, the complainant has admitted that though the complainant has denied that immediately when they reached at the residential premises, immediately they have recorded the statement. However, he has admitted that he has recorded the statement before they started the search of the premises. He has further admitted that he has asked some questions with regard to at what time husband of accused come from the service as well as in respect of any money or ornaments were found and whatever they found during the search, were kept in cup board and that cup board was sealed by them. He has not inquired about the ownership of the premises. However, the complainant has deposed that on inquiry from the respondent, she has disclosed that the premises is in the name of Haribhai. He has denied the rest of the suggestions put to the officers.

He has denied that he has no authority to record the statement of accused and has further denied that under Section 132(4) of the Act, he has no authority to search the premises. He has recorded the statement of the respondent under Section 132(4) of the Act and further, he has not given any notice to the accused before recording her statement.

5. I have gone through the statements of the respondents recorded under Section 132 of the Act dated 29/5/1985 and I have also examined the answers given by the respondents accused in reply of the questions put to her mainly answer Nos. 13 and 17. I have verified the original statement of the respondent accused, wherein, it is only highlighted that before recording the statement, the complainant has administered the oath.

6. P.W. -2 Shri Maheshkumar Jethalal has been examined by the prosecution as witness. He deposed that he is working as an Assistant Manager in a Branch of UCO Bank at St. Xavier's School Road, Ahmedabad and in their Bank, in the joint name of Sobhanaben - the accused has having locker No. 210 and further deposed that locker has been operated by both the persons i.e. Shobhanaben as well as her husband. In the cross - examination, he has deposed that locker has been operated by both. He has denied the suggestion that the first name in the locker is of Shobhanaben. He has also further deposed in cross-examination that whenever, the accused and Rasikbhai - her husband came to bank, said locker was being operated by her husband, he has no knowledge and he has further deposed that the Bank also kept the register regarding operation of the said locker. He has further deposed that Sobhanaben has mostly used and operated the locker and her husband Rasikbhai never come to Bank.

7. I have also gone through the judgement under challenge. In Para-11 of the judgement, the learned Magistrate has observed the evidence of PW-2, wherein, the witness has highlighted about the locker in their branch, which is in the joint name of accused and her husband and its number is 210. The learned Magistrate has further observed that the prosecution has not produced any documentary evidence to show that the said locker has been operated and in fact the locker has been operated by the accused and it is only in the oral evidence, the witness has deposed that the locker is being operated by the accused. No documentary evidence is produced to show that the accused had operated the locker. The learned Magistrate has further observed that it is quite possible that the accused might have got a

locker in the Bank, but might have closed it and as the Manager had not produced any entry from the register that the locker has been operated by the accused at any time and accordingly, the learned Magistrate has recorded finding that the prosecution has failed to prove that the accused had a locker in UCO Bank on or before 29th May, 1985 and the accused intentionally and knowingly made a false statement on oath before the complainant. On close scrutiny and on examining the judgement under challenge, I am not in agreement with the observations made by learned Magistrate, wherein, the learned Magistrate has, in absence of any documentary evidence, held that the prosecution has failed to prove the case against the accused. On close scrutiny of oral as well as documentary evidence and more particularly, on examining the statement recorded by the complainant under Section 132 of the Act dated 29th May, 1985 and as admitted by the complainant that even before starting the search of the house, the statement of the accused was recorded and further that there is nothing to indicate that any information was given to the accused regarding recording of her statement as contemplated under the Act, for which the accused was never informed that her statement will be used as evidence in any proceeding under the Income Tax Act, 1922 or under the Income Tax Act, 1961.

8. Section 132 read as under :-

> Search and Seizure :- (1) [Where the Director General or Director or the Chief Commissioner or Commissioner or any such Deputy Director or Deputy Commissioner as may be empowered in this behalf by the Board], in consequence of information in his possession, has reason to believe that .....

Sub-section 4 :-

> "The authorised officer may, during the course of the search or seizure examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewelry or other valuable article or thing any any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under Act, 1961."

8. As observed earlier, while referring to the statement of the respondent accused under Section 132, Ex. 5, though, it is proved that the respondent was

having a locker in the joint name of her husband in UCO Bank and inspite of knowing this fact, she has on oath given false answers. Considering the scheme of the Act and as admitted by the complainant, admittedly the statement of the respondent accused was recorded before the search was started and in absence of any male members. Even before recording the statements of the respondent nothing is indicated that in what manner the complainant has recorded her statements and has not explained to the accused regarding the use of her statement as evidence, for which, a statement under Section 132 of the Act was to be recorded by him. The original statement only shows that the complainant has administered the oath and he has recorded the statements. Mr. A.D. Shah, learned advocate appearing for the respondent no. 1 has also placed reliance on one unreported decision of this Court in Special Criminal Application No. 279 of 1988 and 250 of 1988, wherein, the Hon'ble Court has not entertained the writ petition filed by the Department under Article 227 of the Constitution of India. However, the Court has observed as under in the said judgement :-

"Moreover, from the facts of the case, it becomes clear that nothing was found to be in possession or control of the accused. Therefore, the Income-tax Officer, acting under Section 132(4), had no right to examine the accused on oath as the condition precedent to the exercise of the power was not fulfilled in this case. As the Income-tax Officer who recorded the statement, had no authority to do so, no action can be taken against the accused even if he proved to have made a false statement before him."

9. On considering the entire evidence on record, it is difficult for this court to interfere with the said judgement of the acquittal recorded by the learned Magistrate by convicting the accused. Accordingly, Criminal Appeal is dismissed. The order of acquittal recorded by the learned Magistrate under Section 181 of IPC is confirmed.

(D.K. Trivedi, J.)

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